Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-295

ALBERT SIMON, INC., and
SEABOARD NEW YORK CORPORATION
Appellants,

v.

BESS MYERSON, AS COMMISSIONER
OF THE DEPARTMENT OF CONSUMER
AFFAIRS OF THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE STATE OF
NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

RUFUS KING
808 Woodward Building
Washington, D.C. 20005
(202) 638-4117

Attorney for Appellants

Of Counsel:

PETER CAMPBELL BROWN
ISADORE B. HURWITZ
RUFUS KING, III

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	5
SUBSTANTIALITY	7
CONCLUSION	11
APPENDICES:	
A. Opinion of the New York State Court of Appeals	1a
B. Opinion of the Appellate Division – First Department	5a
C. Opinion of the Supreme Court, New York County, Special Term	8a
D. Order (Appellate Division – First Department, reversed by Court of Appeals)	12a
E. Notice of Appeal	14a
F. "Common Shows" Ordinance, Administrative Code of the City of New York	17a
G. Gaming Devices Ordinances, Administrative Code of the City of New York	22a
H. Order of City of New York Commissioner of Consumer Affairs	25a
I. Excerpt from Minutes of Hearing, City of New York Department of Consumer Affairs	26a

TABLE OF AUTHORITIES

Cases:

Commonwealth v. Mihalow, 142 Pa. Super. 433, 16 A.2d. 656 (1940) 10

	Page
Cossack et al. v. City of Los Angeles et al., 114 Cal.Rptr. 460, 523 P.2d 260 (1974)	8, 10
Griswold v. Connecticut, 381 U.S. 479 (1965)	11
King v. City Council of Augusta, 277 U.S. 100 (1928)	3
Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947)	8
People v. Bunis, 9 N.Y. 2nd 1, 210 NYS 2nd 505 (1961)	8
People v. Gravenhorst, 32 N.Y.S. 2nd 760 (1942)	5
Poulos v. State of New Hampshire, 345 U.S. 395 (1953) reh. den. 345 U.S. 978	3
Stanley v. Georgia, 394 U.S. 557 (1969)	8
State v. Betti, 23 N.J. Misc. 169, 42 A.2d 640 (1945)	10
Staub v. City of Baxley, 355 U.S. 313 (1958)	3
Times Amusement Corporation v. Moss, 160 Misc., 930 (1936)	9
United States v. Carolene Products Co., 304 U.S. 144 (1938)	8
United States v. Korpan, 354 U.S. 271 (1957)	5
Winters v. New York, 333 U.S. 507 (1948)	7
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	8
Statutes:	
NYC Admin. Code:	
Art. 5, §B32-40.0 through B 32-44.0	4
§ 436-8.0	4
United States Constitution:	
First Amendment	4, 10, 11
Fourteenth Amendment	4, 11
15 U.S.C. § 1171	5
15 U.S.C. § 1178(2)	5
28 U.S.C. § 1257(2)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

ALBERT SIMON, INC., and
SEABOARD NEW YORK CORPORATION
Appellants,

v.

BESS MYERSON, AS COMMISSIONER
OF THE DEPARTMENT OF CONSUMER
AFFAIRS OF THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE STATE OF
NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

Appellants Albert Simon, Inc., and Seaboard New York Corporation appeal from a judgment of the State of New York Court of Appeals entered in this proceeding April 1, 1975 (reargument denied June 4, 1975), reversing a judgment of the Supreme Court, Appellate Division–First Department, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the State of New York Court of Appeals is reported in 36 N.Y.2d 300, and appears hereafter as Appendix A (p. 1a). The opinion of the Supreme Court, Appellate Division–First Department (reversed by the opinion appealed from herein) is reported in 44 A.D. 2d 245 and 354 N.Y.S. 2d 419, and appears hereafter as Appendix B (p. 5a). The opinion of the Supreme Court, New York County, Special Term (reversed by the Appellate Division), is unreported but appears hereafter as Appendix C (p. 8a).

JURISDICTION

This suit was brought to challenge provisions of the New York City Administrative Code prohibiting all coin-operated games "of the type, design, class or construction commonly known as pinball or bagatelle" and all games "involving any element of chance," and to establish by proof that appellants' games were not "gambling devices." Appellants' initiating petition was dismissed by the New York Supreme Court, New York County, Special Term, by order entered January 17, 1974.

The Appellate Division–First Department reversed, by order entered April 30, 1974, (appearing hereafter as Appendix D (p. 12a), holding, inter alia, that the provisions complained of are unconstitutional insofar as they "prohibit the licensing . . . of coin-operated games which do not involve or constitute gambling." The State of New York Court of Appeals reversed, per curiam (Appendix A, p. 1a), by order entered April

1, 1975. A timely motion for reargument addressed to the latter Court was denied June 4, 1975, and notice of appeal to this Court (Appendix E, p. 14a) was filed in the Supreme Court of the State of New York, County of New York, on August 12, 1975.

The jurisdiction of this Court to review this decision is conferred by Title 28, United States Code, §1257(2). The opinions and judgments of all three New York courts squarely considered the constitutional issue, and the Court of Appeals directly acknowledges it: "The ordinance does not violate due process." (Appendix A, p. 3a). Among authorities affirming the jurisdiction of this Court to entertain a direct appeal, in similar cases, are: *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Poulos v. State of New Hampshire*, 345 U.S. 395 (1953), reh. den. 345 U.S. 978; *King v. City Council of Augusta*, 277 U.S. 100 (1928).

QUESTIONS PRESENTED

Three questions are presented in this appeal:

1. Whether a municipality may constitutionally prohibit *per se* bona fide amusement-only coin-operated games, subjecting them to confiscation and their proprietors to criminal sanctions, solely because they are in the generic category "pinball," or because their play involves "any element of chance."

2. Whether a legitimate amusement game may be constitutionally prohibited *per se* because, even though without any inherent characteristics of gambling devices, it might be *used* in gambling.

3. Whether condemning specific amusement games as gambling devices *per se* without permitting proof of their nature or characteristics at any stage of the proceedings violates requirements of due process of law.

STATUTES INVOLVED

The statutes challenged by this appeal are New York City Administrative Code, Article 5, Chapter 32 (§§B32-40.0 through B32-44.0),* and §436-8.0.** These statutes (ordinances) are set out hereafter as Appendix F, p. 17a, and Appendix G, p. 22a, respectively. Appellants claim that as applied to their games the ordinances violate the due process and equal protection clauses of Amendment XIV to the Constitution of the United States.

Appellants also claimed, in briefing their case as appellees before the New York State Court of Appeals, that they supply an entertainment need "to a class of people who have the constitutional right to enjoy themselves," thus raising the possible additional issue of protection for themselves and their patrons under Amendment I.

STATEMENT

For almost fifty years coin-operated pinball games, evolved from the Victorian parlor game of bagatelle

*4 Williams Press Ed., 1970, pp. 918-24

**Ibid., pp. 586-7.

which in turn is based on an old French variant of billiards, have held their own as America's most popular public-location amusement game. Gambling-device manufacturers have produced subterfuge slot machines in pinball guise, *People v. Gravenhorst,* 32 N.Y.S. 2nd 760 (1942), but in 1957 this Court drew lines of demarcation that have virtually eliminated confusion in the field since, *United States v. Korpan,* 354 U.S. 271 (1957). Congress, tightening the 1950 Johnson Act (15 U.S.C. §1171 ff.) in 1962 to ban gambling-subterfuge devices from interstate commerce, expressly recognized the existence and *bona fides* of amusement-type games in the pinball category, 15 U.S.C. 1178(2).

New York City has been closed to all types of pinball games since one of Mayor Laguardia's clean-up campaigns, in 1948. At that time the New York City Council enacted a veritable diatribe against the evils of gambling devices (Appendix G, p. 22a-23a), and outlawed both coin-operated games "involving any element of chance" and–because confusion and subterfuge abuses were commonplace then–games "commonly known as pinball or bagatelle." (Appendix G, p. 24a). An exception (Appendix G, p. 24a) from this ban was provided, however, for any game licensed by the Commissioner of Licenses (later the Commissioner of Consumer Affairs) under the "Common Shows" Article (Appendix F, p. 27a, ff.

Early in 1971 appellants, who are distributors of coin-operated amusement games in the New York area, submitted four amusement pinball prototypes to respondent Commissioner, and she approved them and agreed to license them. Relying on this, appellants

sold some half-million dollars' worth of the games to operators in the City, and licenses were duly issued for them. But in May 1972, after notice and a hearing before a Department Hearing Officer, respondent Commissioner's approval was withdrawn (Appendix H, p. 25a). License renewals for the games were thereafter refused and the instant suit followed.

At the departmental hearing, the Hearing Officer precluded any development of proof that the games in issue were not, in fact, in any way connected with gambling (Appendix I, p. 27a-28a). The Commissioner's decision, issued May 4, 1972, (Appendix H, p. 25a) grounded on conclusions by the Hearing Officer that the games were "predominantly games of chance" not involving "a substantial element of skill," and that "each is a pinball machine."

Appellants' continuing insistence that the Code provisions as interpreted, and the arbitrary conduct of the withdrawal proceedings, violated constitutionally protected due process requirements was acknowledged at every stage (Appendices A, p. 3a and C, p. 10a), and the Appellate Division (one Judge dissenting) agreed with appellants (Appendix B, p. 6a):

> "However, we do find that the statute violates the constitution. The avowed object of the legislation is to prevent the use of gambling devices while allowing machines providing amusement. The statutory test as to what is a gambling device in a coin-operated machine is whether there is any element of chance in the playing of the game. . . .
>
> "The statutory test distinguishing gambling from amusement, provided that test is not illusory (as it is difficult to conceive of any device in which the outcome would not be affected in some degree by

> chance) has no relation to the object to be attained, namely, the interdiction of gambling. Here the player can neither gain nor lose as a result of the game. It would therefore appear that there is lacking any fair, just or reasonable connection between the statutory test and the promotion of the welfare and safety of society—the necessary element to validate an exercise of police power . . . As the statute lacks reasonable relationship and application to the evil it is designed to avoid, it lacks constitutionality." [Citations omitted]

SUBSTANTIALITY

If only injury and affront to the modest industry that provides America with amusement pinball games were at stake, appellants would not be overly confident of redress in this Court, though theirs is an honorable calling and they have been striving for many years to dissociate their products from gambling and gambling activities. They claim to make no contributions of overbearing social worth, beyond providing wholesome entertainment, at modest cost, in today's leisure-oriented society. Bona fide amusement games are no more and no less than coin-operated vendors, offering a few moments' diversion and entertainment for each coin, instead of merchandise or services—though indeed appellants do not feel constrained to stand very humbly in the company of purveyors of toxic alcohol and tobacco, nor with some whom this Court has aided. See e.g., *Winters v.*

New York, 333 U.S. 507 (1948); *Stanley v. Georgia*, 394 U.S. 557 (1969).

But appellants' case comes here raising four issues that are currently of some national importance. With the renaissance of interest in all forms of gambling throughout the nation, and the drive in many states towards legalization, a decision as far from the mark as this, by so eminent a Court, will work much mischief. [Another eminent Court, incidentally, has recently addressed itself to the same problems–arising out of a similarly archaic Los Angeles ordinance–and reached an opposite conclusion. *Cossack et al. v. City of Los Angeles et al.*, 114 Cal Rptr. 460, 523 p. 2d 260 (1974).]

1. The decision complained of stands for the bold proposition that municipal police power in the gambling field is virtually limitless: if appellants' games can be prohibited by the mere designation "pinball," without inquiry into their characteristics or function (and none was permitted here), the ban can be placed on anything some City Council views with displeasure. In the control of gambling, as in other exercises of legislative power, there must be some comprehensible relation between end and means. *Cf., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Kotch v. Pilot Comm'rs*, 330 U.S. 552 (1947); *People v. Bunis*, 9 N.Y. 2nd 1, 210 NYS 2nd 505 (1961). Nor should hyperbolic legislative findings from another era, addressed to matters in no way related to this case, be allowed to affect the outcome. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

2. This case focuses sharply on a persistent confusion in gambling regulation that ought to be, and

could easily be, cleared up once and for all by a few lines from this Court. It is not the presence of *any* element of chance in a game that marks it as gambling. All games must have some unforseen element–the bounce of the ball, the unexpected move by an opponent, the turn of a card–or they would not be games, nor interesting, nor entertaining at all. Neither is it the presence of predominant chance, alone, that can serve as a workable test. Many games, from jackstraws to parcheesi to contract bridge (for ordinary players) are chance-dominated without being gambling.

The true test is the one stated and applied by the Appellate Division in this case (Appendix B, p. 6a):

> "Where a machine is so designed . . . where a player receives a reward contingent on his making a certain score, in the form of a prize of any description . . . the game may well be described as a contest between the player and the machine owner; and, if dependent on chance as opposed to skill, be deemed a gambling device. Here, concededly no such element is present. Here the player is exactly in the same position vis-a-vis the proprietor of the device whether his score is good, bad or indifferent." *Cf., Times Amusement Corporation v. Moss.*, 160 Misc., 930 (1936).
>
> * * * *
>
> "Here the player can neither gain nor lose as a result of the game."

The test, in short, is always whether there is a chance-determined award of some kind of prize, or "winnings"; and this is logical and accurate in its application to coin-operated devices from another aspect: gambling machines must *always* be chance-

controlled, for otherwise the first skilled player who happened along would empty each one.

3. The New York State Court of Appeals also expounds another error that has plagued gambling-law drafters and enforcers, and should be set right. The fact that something can be *used* for gambling, taken alone, is never a fair or adequate test. In that respect nothing outdoes Uncle Sam's tinker-proof, gravity powered, indestructible, portable and handsome-looking heads-and-tails coins. Some objects, such as the traditional one-armed bandit, have characteristics and functions designed for nothing but gambling, and on that basis can be fairly proscribed *per se*. But games like those at issue here, merely selling the amusement inherent in their play, cannot logically or reasonably be made contraband merely because two players (or player and proprietor) might bet with one another on the outcome of a game. In that situation the gambling crime, if any, is chargeable to the wagerers, not to the subject of their wager. See, *Commonwealth v. Mihalow*, 152 Pa. Super, 433, 16 A.2d. 656 (1940); *State v. Betti*, 23 N.J. Misc. 169, 42 A.2d 640 (1945).

4. Briefing this appeal fully, appellants will also present, for possible consideration by this Court, a novel issue that emerged in the *Cossack* case, supra, namely, whether there may be First Amendment protection, developing with the growing importance of wholesome leisure activities in modern life, for recreation and self-expression of one's own free choice. Do New Yorkers have a right to enjoy these innocent games, instead of bowling or boozing or reading smut, from which appellants derive a correlative right to provide them? *Cf., Griswold v. Connecticut*, 381 U.S. 479 (1965).

CONCLUSION

It is accordingly urged that the decision of the New York State Court of Appeals in this case violates appellant's rights under the Fourteenth, and possibly the First Amendments, and will cause difficulty and confusion in the currently important field of gambling regulation and control.

Respectfully Submitted,

Rufus King
Attorney for Appellants
808 Woodward Building
Washington, DC 20005
(202) 638-4117

Of Counsel:
Peter Campbell Brown
Isadore B. Hurwitz
Rufus King, III

August, 1975

APPENDIX A

STATE OF NEW YORK

COURT OF APPEALS

No. 135

In the Matter of Albert Simon, Inc., et al

Respondents.

vs.

Bess Myerson, etc.,

Appellant.

OPINION

PER CURIAM:

This Article 78 proceeding was brought by distributors of four kinds of pinball game machines to vacate a determination of the Commissioner of Consumer Affairs of the City of New York withdrawing approval for licensing and installation of such machines at various premises in the City of New York pursuant to Chapter 32, Article 5 of the City's Administrative Code (§§B 32-40.0 - 44.0; 436-8.0). Petitioners, while conceding there is an element of chance involved in the playing of these games, contend they are essentially amusement rather than gambling devices because no contest takes place between the players and machine (i.e., its owners) resulting in the award of a prize, free play or other benefit to any player. The difficulty with that contention is that the Code's provisions are not limited to gambling devices *per se*.

Instead, in relevant parts, they provide: "Gaming devices prohibited. It shall be unlawful . . . to possess or maintain a gaming device or permit the maintenance or operation of any such gaming device in any premises or place" (Administrative Code of the City of New York, §436-8.0[c]); and "Definitions. Whenever used in this section, the term 'gaming device' shall mean and include: 1. Any game involving any element of chance . . .; . . . 3. Any machine or apparatus of the type, design, class or construction commonly known as pinball or bagatelle . . ." (§436.8.0[b]).

A very extensive declaration of legislative purpose incorporated in the ordinance (§436-8.0[a]) makes clear that it is the *use* to which such gaming devices are put rather than their inherent characteristics that motivated their interdiction. For the declaration states, among other things, that "such gaming devices encourage and foster gambling among adults and children, tend to cause juvenile delinquency . . . and breed crime, rackets and gangsterism", that they "are instruments for gambling in their actual operation and use", that they are "consistently and widely" so used in the city, that many of the places where they are commonly located are "frequented by" and "readily accessible to children" and "in the vicinity of schools", that "in many instances children have squandered lunch money, carfare and earnings needed to supplement the family income on such devices, and have even committed thefts to obtain money with which to play such devices" and that there are other serious consequences affecting crime in the community that flow from such gaming devices.

The legislation adopted by the municipality is required to be reasonably related to a proper governmental purpose, here the prevention of evils associated with gambling. To reinforce the presumption that the regulation is valid (*Nettleton v. Diamond*, 27 NY2d 182,193) we have an expressed legislative judgment that there is a strong relationship between gambling and the evils that attend it, on the one hand, and pinball machines, on the other. We cannot say this judgment is irrational. It would not matter whether the courts thought the legislation unwise, or that its purpose could better be achieved in another way, or that the method chosen was ineffective. So long as it has a rational basis, the choice of the particular course to be taken was for the legislature. The ordinance does not violate due process. Its validity does not depend upon a showing that every pinball machine will in fact be used for an improper purpose. (Cf., *Grossman v. Baumgartner*, 17 NY2d 345,349.) Also, hardship to the particular petitioner cannot overcome the reasonably presumed public benefit of an otherwise valid ordinance. (Cf., *Town of Hempstead v. Goldblatt*, 9 NY2d 101,105.)

The fact that the Commissioner originally approved and licensed these machines does not result in estoppel in this case. An erroneous application of law does not relieve a public official from the obligation to apply and enforce it correctly thereafter. (*Rubel Corp. v. City of New York*, 13 N.Y.S. 813, aff'd 274 App. Div. 925). At the administrative hearing which preceded the decision to withdraw the approval, the hearing officer, for the reasons already stated, correctly viewed the issue before him for determination

to be not whether the particular pinball machines were gambling devices in and of themselves but simply whether they were either pinball machines or games with an "element of chance" so as to come within the embrace of the ordinance's language. The determination that they met those criteria was supported by substantial evidence.

Finally, petitioner's preemption argument is not persuasive. Penal Law Article 225, dealing with gambling offenses, indicates no legislative intent to reserve to the state exclusive regulatory power in the gambling field so as to prevent a city from deciding to prohibit pinball machines or games of chance. (Cf. *People v. Cook*, 34 NY 2d 100; *Myerson v. Lentini Moving and Storage*, 33 NY 2d 250.)

The order of the Appellate Division should be reversed and the petition dismissed.

* * * * *

Order reversed, with costs, and the petition dismissed. Opinion Per Curiam. All concur.

Decided April 1, 1975

APPENDIX B

SUPREME COURT, APPELLATE DIVISION FIRST DEPARTMENT, APRIL 1974

IN THE MATTER OF THE PETITION OF ALBERT SIMON, INC., and SEABOARD NEW YORK CORP., petitioners-appellants, v. BESS MYERSON, AS COMMISSIONER OF THE DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK, respondent-respondent.

Decided April 16, 1974.

Before *Nunez, J.P.; Kupferman, Murphy, Steuer* and *Tilzer, JJ*

Appeal from a judgment of the Supreme Court (Spiegel, J.), entered in New York County on Jan. 17, 1974, dismissing the petition.

Isadore B. Hurwitz and Peter Campbell Brown, attorneys for petitioners-appellants.

Nina G. Goldstein of counsel (L. Kevin Sheridan with her on the brief; Adrian P. Burke Corporate Counsel) for respondent-respondent.

Steuer, J.—The petitioners manufacturers of what are called "common show games," devices in the nature of pinball machines, submitted samples of four such machines to respondent commissioner of Consumer Affairs for her approval. Approval was accorded to the machines, manufacture was begun, and machines were sold and installed in various premises about the city. Somewhat over a year later, respondent, upon advice from a police expert that the

machines were gambling devices and hence prohibited under section B32-40.0 of the Administrative Code, withdrew the approval theretofore granted.

This proceeding under article 78 followed. It is based on several grounds. We agree with respondent that many of these are untenable. Initially, there can be no estoppel against a public body or officer in this situation. A public officer is required to so act (Emerman v. City of New York, 34 A. D. 2d 901, 902). Hardship resulting from the correction does not change the rule (N. Y. City Employees' Retire System v. Eliot, 267 N. Y. 193, 202). Nor do we find that the state has preempted the field.

However, we do find that the statute violates the constitution. The avowed object of the legislation is to prevent the use of gambling devices while allowing machines providing amusement. The statutory test as to what is a gambling device in a coin-operated machine is whether there is any element of chance in the playing of the game. Initially, it should be remembered that play on these devices is not in the nature of a contest, where the player competes against an opponent. Where a machine is so designed, as where the player receives a reward contingent on his making a certain score, in the form of a prize of any description—even to the extent of getting permission to play the game again without paying—the game may well be described as a contest between the player and the machine owner; and, if dependent on chance as opposed to skill, be deemed a gambling device. Here, concededly no such element is present. Here the player is exactly in the same position vis-a-vis the

proprietor of the device whether his score is good, bad or indifferent.

The statutory test distinguishing gambling from amusement, provided that test is not illusory (as it is difficult to conceive of any device in which the outcome would not be affected in some degree by chance) has no relation to the object to be attained, namely, the interdiction of gambling. Here the player can neither gain nor lose as a result of the game. It would therefore appear that there is lacking any "fair, just or reasonable connection" between the statutory test and the promotion of the welfare and safety of society—the necessary element to validate an exercise of the police power (People v. Gilison, 109 N. Y. 389, 401, quoted with approval in People v. Bunis, 9 N. Y. 2d 1, 3, et seq.). As the statute lacks reasonable relationship and application to the evil it is designed to avoid, it lacks constitutionality (Defiance Milk Products Co. v. Du Mond, 309 N. Y. 537, 541).

The judgment entered Jan. 17, 1974, in New York County (Spiegel, J.) should be reversed on the law and the relief demanded in the petition granted, without costs. Settle order on notice.

All concur except *Tilzer, J.*, who would affirm on the opinion of *Spiegel, J.*, at Special Term.

APPENDIX C

SUPREME COURT NEW YORK COUNTY

SPECIAL TERM PART I

IN THE MATTER OF THE PETITION OF
ALBERT SIMON, INC. and SEABOARD
NEW YORK CORPORATION,
Petitioners,

-against- Index No.
10448/1972

BESS MEYERSON, AS COMMISSIONER OF
THE DEPARTMENT OF CONSUMER AFFAIRS
OF THE CITY OF NEW YORK,
Respondent.

SPIEGEL, J.:

In this Article 78 proceeding, petitioners seek (a) to annul and vacate a determination of the respondent to withdraw approval of certain games as Common Show Games and to direct renewal of the Common Show licenses of such games; (b) a declaration that the provisions of the Administrative Code prohibit coin operated amusement games that are gambling devices and authorize and mandate the issuance of Common Show licenses for games that are not gambling devices; (c) a declaration that the games involved are not gambling devices and (d) a permanent injunction enjoining respondent from withdrawing the approval

previously granted to these machines as Common Show games.

Petitioners are corporate distributors of certain coin operated machines. In early 1971 the respondent Department of Consumer Affairs of the City of New York, without a hearing, approved the four games in question as common shows, licensable pursuant to Title B, Chapter 32, Article 5, section B32-40.0 of the Administrative Code. Petitioners then distributed the four games to location owners (petitioner's lessees and distributees in the City of New York) allegedly necessitating a substantial financial investment. In March, 1972 proceedings to consider withdrawing approvals for the games were commenced by respondent upon notice to petitioners. After a hearing, the hearing officer made findings of facts that each of the four machines were predominantly games of chance and that they were pinball machines and recommended to the Commissioner that approval for the games be withdrawn. The Commissioner concurred in the findings of the hearing officer and withdrew the approvals on the basis that the machines were not common show games within the meaning of the Administrative Code (B32-40.0). The instant proceeding was commenced on May 17, 1972, at which time petitioners obtained a stay of the Commissioner's determination withdrawing approvals for the four games.

The petitioners allege that respondent's withdrawal of the approvals is erroneous as a matter of law, arbitrary and capricious, and a violation of due process.

It is clear that the legislative body of the City of New York has determined that pinball machines and

games of chance are not common show games and thus not permitted to be installed, operated or maintained at premises licensed pursuant to Chapter 32, Article 5 of the Administrative Code. (§§436-8.0, B32-40.0). The purpose of the legislation in this area was to reduce gambling and hinder the development of a gambling instinct (Administrative Code §436-8.0). Thus, the Legislature has determined that there is a nexus between certain types of machines and gambling. In the exercise of its police powers the Legislature has sought to correct the potential evil of such machines by prohibiting their licensing. There has been no showing that such a prohibition is without a rational basis or should be vacated (Grossman v. Bangertner, 17 N.Y. 2d 345). The court will not examine the wisdom of the legislative enactments.

Petitioners' contention that the hearing by respondent violated due process is without merit. There was no necessity for the hearing to consider whether the machines in question are gambling devices. The only relevant question at the hearing related to whether the approvals given to the machines should be withdrawn because the machines were of such a nature that their licensing was prohibited by the Administrative Code. As the games were found to be pinball machines and games of chance, the Commission was without discretion to allow them to continue to be licensed.

Further, there can be no estoppel of the right of the respondent in the exercise of its police powers to withdraw approval of the games. (Matter of Rochester Transit Corp. v. Public Service Commission of State of New York, 271 App. Div. 406). The failure of a municipality or administrative agency to enforce

rights, whether for a long period or a short one, cannot be made the basis of an admission or estoppel resulting in possible loss to the public of the municipalities' rights. (Rubel Corp. v. City of New York, 13 N.Y.S. 813, aff'd 274 App. Div. 925). Where, as here, a business is of such a nature that it is potentially evil and can be prohibited in the exercise of police powers, there can be no doubt of the municipality's right to take action in regard to the licensing of that business. Upon a finding that the prior approval of the games was erroneous, the respondent was bound to withdraw the approvals and deny the renewal of licenses for premises where such games are located. The Court is mindful of the petitioners' contention that the respondent's determination will cause economic hardship to petitioners in light of their investment in these games. However, a possible harsh result on petitioners cannot take precedence over the rights of the public.

Finally, the Court finds that the city licensing prohibitions do not conflict with state law or enter into a field preempted by state law.

Thus, there has been no showing that the determination of the respondent is arbitrary, capricious or a violation of due process. The application is denied and the petition is dismissed.

The stay heretofore granted by the order to show cause is continued until 5 days after publication of this decision to enable petitioners if they are so disposed to make application to an appellate court.

Settle judgment.

Dated: December 11, 1973.

J. S. C.

APPENDIX D

Order

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York, on the 30th day of April, 1974.

PRESENT: HON. EMILIO NUNEZ, Justice Presiding
HON. THEODORE R. KUPFERMAN
HON. FRANCIS T. MURPHY, JR.
HON. ARON STEUER
HON. GEORGE TILZER
Justices

Filed
Apr. 30, '74
Appellate Division, Supreme Court
First Department

In the Matter of the Petition of

ALBERT SIMON, INC. and SEABOARD NEW YORK CORPORATION,
Petitioners-Appellants,

against

BESS MYERSON, as Commissioner of the Department of Consumer Affairs of the City of New York,
Respondent-Respondent.

The petitioners-appellants Albert Simon, Inc. and Seaboard New York Corporation having appealed from a judgment of the Supreme Court, New York County, at Special Term (SPIEGEL, J.), entered January 17, 1974, denying their application for relief under Article 78 of the CPLR in all respects and dismissing their petition; and said appeal having duly come on to be heard

before this Court, and having been argued by Mr. Isadore B. Hurwitz, of counsel for the petitioners-appellants, and by Ms. Nina G. Goldstein, of counsel for the respondent-respondent; and due deliberation having been had thereon; and upon the opinion of this Court by Mr. Justice Steuer filed herein, with one of the Justices dissenting and who would affirm on the opinion of Spiegel, J., at Special Term, it is hereby

ORDERED that the judgment appealed from be and the same is reversed on the law and the relief demanded in the petition granted, without costs; and it is further

ORDERED AND ADJUDGED that the determination of respondent, dated May 4, 1972, withdrawing approval of the four coin-operated games referred to in the petition as Common Show games be and the same hereby is annulled; and it is further

ORDERED that Section B32-40.0 of the Administrative Code of the City of New York is hereby declared to be unconstitutional insofar as it prohibits the licensing as Common Shows of coin-operated games of chance which do not involve or constitute gambling; and it is further

ORDERED that the Commissioner of the Department of Consumer Affairs of the City of New York be, and she hereby is, permanently restrained and enjoined from withdrawing the approval previously granted to the four coin-operated games referred to in the petition as Common Show games and from failing to renew the Common Show licenses for same; and it is further

ORDERED, that the Clerk of the County of New York is directed to enter judgment in favor of the petitioner as herein provided, without costs.

Enter:

A. S.
Justice

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Petition
of ALBERT SIMON, INC., et al,
Petitioners–Appellants,

–against–

BESS MYERSON, as Commissioner of the Department of Consumer Affairs of the City of New York,
Respondent-Appellee.

INDEX NUMBER
10448/1972

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that ALBERT SIMON, INC. and SEABORD NEW YORK CORPORATION, the Petitioners above named, hereby appeal to the SUPREME COURT OF THE UNITED STATES from the final judgment of the STATE OF NEW YORK COURT OF APPEALS entered in this action on April 1, 1975, reversing the judgment of the APPELLATE DIVISION–FIRST DEPARTMENT, entered April 30, 1974.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the SUPREME COURT OF THE UNITED STATES, and include in said transcript the following:

The Appendix filed in this cause by the parties in the STATE OF NEW YORK COURT OF APPEALS (No. 135 in that Court).

III. The following questions are presented by this appeal:

1. Whether a municipality may constitutionally prohibit *per se* bona fide amusement-only coin-operated games, subjecting them to confiscation and their proprietors to criminal sanctions, solely because they are in the generic category "pinball", or because their play involves "any element of chance."

2. Whether a legitimate amusement game may be constitutionally prohibited *per se* because, even though without any inherent characteristics of gambling devices, it might be *used* in gambling.

3. Whether condemning specific amusement games as gambling devices *per se* without permitting proof of their nature or characteristics at any stage of the proceedings violates requirements of due process of law.

ISADORE B. HURWITZ
Attorney for Petitioners-Appellants
10 East 40th Street
New York, New York 10016

Of Counsel:

PETER CAMPBELL BROWN, ESQ.
RUFUS KING, ESQ.
RUFUS KING, III, ESQ.

PROOF OF SERVICE

I, ISADORE B. HURTWITZ, one of the attorneys for ALBERT SIMON, INC. and SEABOARD NEW YORK CORPORATION, Appellants herein, and a member of the Bar of the SUPREME COURT OF THE UNITED STATES, hereby certify that on the 11th day of August, 1975, I served a copy of the foregoing Notice of Appeal on Respondent Commissioner of the Department of Consumer Affairs of the City of New York, by mailing a copy thereof to W. BERNARD RICHLAND, ESQ., Corporation Counsel of the City of New York, Municipal Building, New York, New York 10007, in a duly addressed envelope, with first class postage prepaid.

ISADORE B. HURWITZ

APPENDIX F

Administrative Code of the City of New York

* * * *

ARTICLE 5

[COMMON SHOWS]

§B32–40.0 **Definitions.**–a. Whenever used in this article the term, "common show" shall include:

* * * *

(2) Any machine, apparatus, paraphernalia or device, whether manually, mechanically, electrically or otherwise operated, including shooting game devices in which no firearm ammunition is used, in or upon which a game of skill or amusement may be played by one or more persons, singly or collectively, upon the payment of a fee, charge or other consideration, and which machine, apparatus, paraphernalia or device is not arranged, adapted or equipped so that the outcome of the games played thereon or therein is affected by any element of chance;

(3) Any machine, apparatus, paraphernalia, or amusement device other than the type, design, class or construction commonly known as a pinball or bagatelle and other than any machine, apparatus or device commonly known as a slot machine or one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him, the user may receive or become

entitled to receive any piece of money, credit, allowance or thing of value or any check, slug, token or memorandum whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value; provided that if a coin slot forms a part of such machine, apparatus, paraphernalia or amusement device, such slot, by the insertion of a coin therein, as in a skeeball game, serves only to release a ball or balls from direct manual use thereof, in the playing of the amusement device or contest; and provided further that such amusement device is maintained or operated in a business place principally devoted to amusement or entertainment purposes, open to the public and located either in any of the outdoor summer amusement areas adjacent to a surf bathing beach or in any other area where amusement devices have been heretofore operated or maintained and common show licenses customarily granted therefor, and which business place is not principally an establishment for the sale of merchandise, drinks or foodstuff.

The intended types of machine, apparatus, paraphernalia or amusement device classified and included as a "Common Show" under this subdivision are limited to those amusement devices known as "Poker Roll", "pokerino", "Fascination", "Five Star Final", "Tic-Tac-Toe", "Racers" and other devices of similar style,

mechanical and structural construction and method of operation. It is not intended to include within the provisions of this subdivision any machine, apparatus, paraphernalia or amusement device upon the playing surface of which exists any bumpers obstructions or obstacles other than the holes or receptacles for which the propelled object is ultimately destined, nor one which is so constructed as to permit the re-use of the device without the insertion of another coin nor one which may be readily converted into one that will permit the re-use of the device without the insertion of another coin;

* * * *

b. Whenever used in this article, the following terms shall mean and include:

1. "Common Show Operator." Any person who maintains or operates a common show.

2. "Common Show Attendant." Any person other than a common show operator who shall take part in the operation of a game licensed as a common show.

c. Nothing in this article shall be construed to authorize gambling or any games of chance.

* * * *

§B32–41.0 **Operator's license; fee; unlicensed attendants.**– a. It shall be unlawful for any person to act as a common show operator without a license therefor.

b. The annual fee for such a license shall be fifty dollars (50), except:

* * * *

3. Where a common show operator owns and/or operates a common show under the provisions of

subdivision a (2) of section B32–40.0, he shall pay a license fee of fifty dollars ($50) therefor; provided, however, said operator may at any time while his common show license is in full force, replace the common show so licensed, without the payment of any future license fee therefor, with any machine, apparatus, paraphernalia or device of the type style and construction including a shuffleboard, shuffle or skeeball game heretofore or hereinafter approved by the department of licenses. Should said common show operator own and/or operate more than one common show, he shall obtain a separate license and pay a separate license fee of fifty dollars ($50) for each and every such additional common show subject, however, to the same right of substitution under each such additional license hereinabove described.

* * * *

§B32–42.0 **Attendant's license; fee;s change of employ.**–a. It shall be unlawful for any person to act as a common show attendant thereof. Failure to do so shall be cause for 'suspension or* section B32–41.0, where all the requirements of such subdivision are fulfilled.

* * * *

§B32–43.0 **License, expiration and transfer.**–a. All operators' and attendants' licenses shall expire on the 15th day of March next succeeding the date of issuance thereof, unless sooner suspended or revoked by the commissioner.

b. Such licenses shall be used only by the person to whom and for the location for which they were

*So in original. Should probably read of.

issued, and shall not be transferable.

§B32–44.0 **Violations.**–Any person who shall violate any of the provisions of this article, shall be guilty of an offense, and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding ten days, or by both; and any such person, for each conviction of such offense, shall be subject also to the payment of a penalty of one hundred dollars, to be recovered in a civil action. The punishment provided in this section shall be in addition to any other punishment or penalty prescribed in any section of this article.

APPENDIX G

Administrative Code of the City of New York

* * * *

§436–8.0 **Gaming devices.**–a. Legislative declaration. It is hereby declared that the possession, maintenance and operation in the city of gaming devices, as herein defined, are a menace to the public health, morals, safety and general welfare of the people of the city, and that such gaming devices encourage and foster gambling among adults and children, tend to cause juvenile delinquency and corrupt the morals of children, and breed crime, rackets and gangsterism. It is hereby declared that such gaming devices are instruments for gambling in their actual operation and use; that such gaming devices maintained and operated in the city are regularly, consistently and widely used as a means of gambling by the public; that it is the established practice of persons who distribute and operate such gaming devices, and it is an indispensable means of obtaining patronage therefor, to place such devices in candy, cigar and stationery stores, ice cream parlors, luncheonettes, location in resort neighborhoods and similar establishments frequented by the general public and by children; that by reason of the public locations where such gaming devices are customarily maintained, they are readily accessible to children; that many of the locations where such devices are and have been maintained are in the vicinity of schools, and are customarily frequented by large numbers of school children; that children as well as adults make a practice of playing these gaming devices and of gambling on the same; that in many instances children

have squandered lunch money, carfare and earnings needed to supplement the family income on such devices, and have even committed thefts to obtain money with which to play such devices and gamble on the same; that the customary gambling on such devices is readily observable by children of all ages who frequent the locations where such devices are maintained; that gaming devices exercise a demoralizing effect upon the youth of the city, tend to teach children to gamble, engender juvenile delinquency, and involve children in harmful associations and an unfavorable environment, that criminals, racketeers and persons with underworld associations have engaged in and have sought to engage in the distribution, placing and operation of gaming devices in the city; that the distribution and operation of gaming devices have been commonly accompanied by racketeering and gangster tactics on the part of criminals and underworld elements;xthat proceeds derived by such persons from gaming devices have been used to finance criminal activities and the operation of criminal gangs; and that experience has demonstrated that by reason of various factors, including competition and rivalry among criminals and racketeers who seek to control the distribution and maintenance of gaming devices, there is danger of outbreaks of racketeering, homicides, crimes of violence, gang wars and other conditions detrimental to public peace and safety, unless the possession, maintenance and operation of gaming devices are prohibited within the city. The necessity for legislative intervention by the enacement of the provisions of this section is hereby declared as a matter of legislative determination.

b. Definitions. Whenever used in this section, the term "gaming device" shall mean and include:

1. Any game involving any element of chance which is caused to operate or may be operated as a result of the insertion of any piece of money or coin or the insertion of any object for which a fee, charge or other consideration is imposed directly or indirectly;

2. Any machine or apparatus, whether manually, mechanically, electrically or otherwise operated and whether or not affixed or attached to or installed in any premises or place, in or upon which machine or apparatus, a game involving any element of chance may be played by one or more persons, singly or collectively, upon the payment of a fee, charge or other consideration directly or indirectly;

3. Any machine or apparatus of the type, design, class or construction commonly known as pinball or bagatelle upon which a game is played upon payment of fee, charge or other consideration directly or indirectly.

The term "gaming device" shall not include any game, machine or apparatus for which a license is required pursuant to any other provision of this code or for which a license is dispensed with pursuant to subdivision A(4) of Section B32–40.0.

c. Gaming devices prohibited. It shall be unlawful for any person, by himself or by an agent or employee, to possess or maintain a gaming device or permit the maintenance or operation of any such gaming device in any premises or place.

d. Violations. Any person who violates this section shall be guilty of a misdemeanor.

APPENDIX H

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

Department of Consumer Affairs,	:
Complainant,	:
–against-	:
Albert Simon, Inc., Seaboard New York	:
Corporation and all other interested	:
parties,	:
Respondents.	:

Approvals previously granted by the Department of Consumer Affairs for common show games known as "William's Four Aces," "William's Planets," "Gottlieb's Extra Innings" and "Gottlieb's Challenger" are hereby withdrawn for the following reasons:

> After reviewing the record in this matter, I concur with the hearing officer's recommendations that each of the four above mentioned games are predominantly games of chance; each does not involve a substantial element of skill; each is a pinball machine.

Based upon the entire record, approvals for these games are hereby withdrawn and licenses for premises where the aforesaid games are located will not be renewed, as these games are not common show games as defined in Section B32-40.0 of the Administrative Code of the City of New York.

Dated, New York City
May 4, 1972

/s/ Bess Myerson
COMMISSIONER

APPENDIX I

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

Department of Consumer Affairs,	:
Complainant,	:
–against–	:
Albert Simon, Inc., Seaboard New York	:
Corporation and all other interested	:
parties,	:
Respondents.	:

* * * *

MONDAY, APRIL 10, 1972

AFTERNOON SESSION

HEARING OFFICER FREEDMAN: It is now 2:15 PM. I am now reconvening this hearing. Lt. Kolesnikoff has resumed the stand. I remind you, Lt. that you are still under oath.

I've been informed by counsel that counsel's table, that Mr. Blatt, the attorney who was cross-examining Lt. Kolesnikoff prior to the lunch recess, has been called away to another matter in a court; and that he may or may not return later.

In any event, on my own motion, I would certainly permit Mr. Blatt to continue with any cross-examination he may have, remaining, upon his return.

Gentlemen, which one of you wishes to proceed? All right. Mr. King.

BY MR. KING:

Q Lt., are you still connected with gambling law enforcement on the force?

A No sir, not in my particular job.

Q How long since you've been connected with that?

A Since June, this past June of '71.

Q But you still have a pretty general idea of what goes on in this area, being a department expert in the field?

Lt. Kolesnikoff

A Yes sir.

Q Have there been any complaints about gambling on any of these four machines that are at issue here?

A These four?

Q Within your own knowledge?

A To my knowledge, no. I don't know anything about these.

Q Well, was it your intention to testify as an expert this morning, that these four machines are gambling devices?

A My intention was to, after examining these machines, just answer the questions that would be asked, in the certain area that I examined them.

Q Do you have an opinion as to whether they are gambling devices?

MR. HAIMOWITZ: I object.

MR. KING: He's an expert. I'm entitled to have his opinion.

MR. HAIMOWITZ: Well, but the question– direct testimony concerning–

HEARING OFFICER FREEDMAN: The question really is, whether or not the issue you are raising is

number one, one which was brought up on direct examination; which I believe, it was not. And number two; is whether or not this issue is relevant or material to this proceeding. Now, again, I would have to refer to the notice of hearing. I don't believe that an issue before me today, is whether these are gambling devices; as I believe they probably are dealt with in the penal law.

MR. KING: Well, for example, I heard the Lt. testify, I thought, that the presence of the "tilt mechanism" indicated to him, that if they were giving a prize, and therefore, it was a gambling transaction; and were that tilt mechanism not on there, then it would not be used to give a prize.

And there have been references, a number of times, to gambling activity. I thought he qualified as an expert on gambling and amusement games. And really, the nub of this hearing, I thought, and the nub of his testimony, so far, is that these are objectionable basically; well basically, under the gambling sections of the New York Municipal Code.

HEARING OFFICER FREEDMAN: Let me state my position. My position is that we are not dealing here with the issue of a gambling device. I do not believe that there is anything in Chapter 32, Article 5 of the Administrative Code, which deals with the concept of a gambling device.

I do believe that a gambling device is dealt with under New York State Penal Law. But that is not before me today. And, therefore, I would sustain the objection and ask you to confine your questions to the issues that are before me today.

* * * *